Supreme Court, U. S.
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No. 76-1095

In the Supreme Court of the United States

OCTOBER TERM, 1976

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Respondent argues that the decision below does not conflict with *Wilson* v. *United States*, 412 F. 2d 694 (C.A. 1), because that case "was confined to * * * the technical requirements of Section 119" (Br. in Opp. 8), while this case turns on whether the cash meal allowances are "gross income" within the meaning of Section 61(a). But neither the decision below nor the First Circuit's opinion in *Wilson* can be so narrowly read. In aligning itself with the Fifth, Eighth, and Tenth Circuits (Pet. App. B 41A), the court below held that the meal payments qualified for the Section 119 exclusion. Moreover, before the court in *Wilson* considered the applicability of Section 119, it stated: "We start with the proposition that all remuneration received for services is gross income unless it falls within a specific exclusion" (412 F. 2d at 695). Respondent therefore errs in suggesting (Br. in Opp. 8) that the conflict

might never have arisen had the First Circuit considered Section 61.

At all events, the cash allowances at issue in this case are now subject to tax in the First and Fourth Circuits, and not taxable in the Third, Fifth, Eighth, and Tenth Circuits. As a logical matter, the applicability of the statutory exclusion of Section 119 only arises after one concludes that the meal allowances are "gross income" under Section 61(a). Thus, the disparity of tax treatment that now exists in the various circuits can only be eliminated by this Court's resolution of the conflict with respect to both Sections 61(a) and 119. Since the decision below held that the meal allowances were not gross income under Section 61(a) and were otherwise excludable under Section 119, the Court should grant certiorari in this case to establish a uniform national rule with respect to such payments.[1]

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

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[1]We are serving a copy of this memorandum upon counsel for the respondent in *United States* v. *Smith*, in which our petition for a writ of certiorari is pending (No. 76-1243) with respect to the Section 119 issue.